United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1188

B P/s

To Be Argued By:

JOSEPH BEELER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1188

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

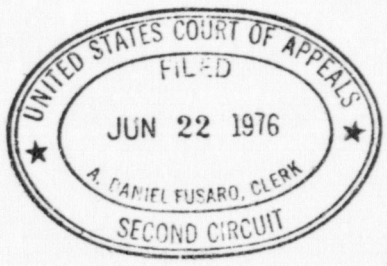
v.

BENJAMIN RODRIGUEZ,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT



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PRELIMINARY STATEMENT

A two-count indictment was founded against defendant-appellant Rodriguez on April 14, 1974, charging him, in Count I, with attempting to evade income taxes for the year 1967 in violation of 26 U.S.C. §7201 by omitting in his 1967 tax return income received "from the purchase and sale of heroin," and, similarly, in Count II, with submitting a false income tax return for the year 1967 in violation of 26 U.S.C. §7206(1) by failing to report "additional income derived from another business, to wit, trafficking in heroin . . . ." Following his plea of not guilty, he was tried in the United States Dis-

trict Court for the Southern District of New York before the Honorable Robert L. Carter and a jury. A verdict of guilty was returned as to each count on March 2, 1967. On April 6, 1976, the Court entered judgment sentencing Mr. Rodriguez to two years' imprisonment on Count I and to no sentence on Count II on grounds that it was a lesser included offense. The Court below issued no decisions or opinions, reported or otherwise.

STATEMENT OF FACTS

-- Introduction --

This appeal is about the fair trial the defendant-appellant did not receive in the court below. No sufficiency of the evidence point is pressed and, accordingly, no elaborate statement of facts in this income tax evasion prosecution is required. We do not anticipate the government arguing the evidence in this highly disputed case was legally overwhelming.

-- The Indictment --

Briefly, an indictment was founded six years, to the day, after the April 15, 1968 filing deadline of Benjamin Rodriguez's joint federal income tax return for the year 1967. The Grand Jury charged him basically with avoiding taxes by concealing income received in the alleged purchase and sale of heroin.

-- The Specific Item --

The government called one informant witness, Claude Pastou, to prove this drug trafficking (Tr.918-1109). Pastou, who faced 1000 years' imprisonment in this Country alone (Tr.976-81) and who admitted on cross-examination that he was in "an occupation in which one survives by the use of his wits" (Tr.974-75), testified that during August, September and October 1967 he sold 58 kilograms of heroin at $11,000 per kilogram to the defendant. A Drug Enforcement Administration agent testified as an expert that, in his opinion, during that time period quick middleman sale of such contraband would result in profit of 30 to 100 percent (Tr.1159-1210). Additionally, there was some evidence presented circum-

stantially corroborating Pastou's testimony hat he used a suitcase with a false bottom to transport heroi (Tr.1110-58), that the defendant owned a maroon Lincoln (Tr.1300-01), that the defendant had a son in a certain age range (approximately 5 to 7 years old in 1967)(Tr.1226), and that a court record corresponded to information Pastou received from a third party (the persons he testified introduced him to the defendant).

-- Expenditures Method Proof --

Evidence was introduced by the government to show a financial starting point of roughly $1,000 of liquid assets in the defendant's hands in September of 1966. The most direct evidence was a financial statement the defendant had filed with a New Jersey bank in the process of assuming a mortgage incident to the purchase of a home, although the government also tried to show circumstantially that the defendant was short on money at this time. Additionally, the government proved that the defendant expended nearly $80,000 during the last months of 1967, primarily in making investments. His tax return for 1967 reported roughly $7,000 in income. And he also received some $5,000 from the repayment of a loan which is a nontaxable source.

-- Hoard of Assets --

Pursuant to its expenditures method of proof the government, among other things, had the burden of disproving the existence of very substantial assets which the defendant claimed as the source of his expenditures. The government attempted to disprove -- and the defendant in his case attempted to prove -- that the

defendant had been the beneficial owner of real property in Puerto Rico. There is no dispute that three quite substantial properties were sold in November of 1965 nor that the defendant, represented by counsel, was the prime mover in the sale. There is no dispute that these were corporate properties nor that defendant was not the record owner. But the defendant contended that the other participants in the sale were his nominees whereas the government contended to the contrary, arguing that they, and Mr. Rodriguez as well, were nominees of one Raymond Marquez -- an alleged "numbers operator" in New York.

-- Other Matters --

The case was finally submitted to the jury, over defense objection, on instructions which would permit a conviction predicated on either specific item or expenditures proof, that is, even if the jury disbelieved the narcotics trafficking allegations of the indictment. The prosecutor's final argument drew attention to the defendant's failure to contradict Claude Pastou and his failure to present evidence of where cash was hidden, circumstances which the defendant claimed impermissibly burdened his decision not to take the witness stand. During the course of deliberations the jury sent out several notes. One revealed that at least one juror held the opinion that the defendant had not received a fair trial. In response the trial judge delivered a modified Allen charge which, among other things, instructed the jury that it had no function concerning any aspects of fairness. Another note revealed that the juror still held

the opinion that the defendant had not received a fair trial and also held the opinion that the evidence was insufficient to convict. The judge failed to notify counsel of this note and simply sent an instruction back to the jury that it must continue deliberating. Counsel were informed of these communications several hours after the fact.

ARGUMENT

I

THE GRAND JURY'S LIMITED AND SPECIFIC FINDING THAT THE DEFENDANT HAD CONCEALED INCOME MADE IN HEROIN TRANSACTIONS WAS EFFECTIVELY AMENDED WHEN THE COURT INSTRUCTED THE PETIT JURY THAT IT COULD RETURN A FINDING OF GUILTY EVEN THOUGH IT BELIEVED THE DEFENDANT RECEIVED NO INCOME FROM DRUG TRAFFICKING, THUS BYPASSING DEFENDANT'S CONSTITUTIONAL SAFEGUARD OF A GRAND JURY INDICTMENT IN VIOLATION OF STIRONE V. UNITED STATES.

A two-count indictment was founded against Mr. Rodriguez on April 14, 1974, charging him, in Count I, with attempting to evade income taxes for the year 1967 in violation of 26 U.S.C. §7201 by omitting in his 1967 tax return income received "from the purchase and sale of heroin," and, similarly, in Count II, with submitting a false income tax return for the year 1967 in violation of 26 U.S.C. §7206(1) by failing to report "additional income derived from another business, to wit, trafficking in heroin . . . ." Despite the singularity of the Grand Jury finding of narcotics trafficking income, the trial was permitted to proceed to verdict on expenditures method proof as well as a specific item proof and, significantly, the petit jury was instructed that it could return a finding of guilty even though it may well have believed that Mr. Rodriguez received no income from drug trafficking (Tr.2145-61). That is, the Grand Jury made specific and relevant allegations that one particular kind of income had been concealed. The prosecution attempted to prove the specific item allegation by Claude Pastou's testimony and to corroborate this charge circumstantially by expenditures method proof. See gen-

erally, Duke, Prosecutions for Attempts to Evade Income Tax; A Discordant View of a Procedural Hybrid, 76 Yale L.J. 1, 13, 15 (1966). No complaint is lodged against this procedure. But the trial jury was finally instructed that it could ignore the heroin dealing allegations and convict without finding that the defendant made his income from any particular source.

Throughout the trial defendant urged that a verdict could not properly be predicated on charges extending beyond the grounds of the indictment. He submitted jury instructions to this effect (Requests Nos. 7 and 8), which were denied. But the issue came to a precise head when the jury requested a specific instruction,

> "Please, may we have an answer to: Is it sufficient evidence of guilt that the defendant spent moneys [sic] in 1967 in excess of reported income regardless of the source of that income, presuming his net worth was as stated in the 1966 statement of net worth, or did that income have to come from the heroin trafficking?"
>
> (Tr.2158-59; 2145)

and the Court over objection (Tr.2160-61) answered, in essence, yes, it is sufficient evidence of guilt that the defendant spent money in excess of reported income without regard to particular source and, no, "in order to convict the defendant under the expenditures method you need not find that he made his income from any particular source" (Tr.2059-60).

Defendant contends that the Court effectively amended the indictment and permitted the petit jury to rest conviction on charges never made against him by any Grand Jury. Stirone v. United States, 361 U.S. 212 (1960). The prosecution contends

that there was no violation of the Supreme Court's unanimous decision in Stirone, that the Grand Jury's findings of heroin trafficking income were mere surplusage which could properly be read out of the indictment.

Stirone v. United States, 361 U.S. 212 (1960) was a Hobbs Act prosecution for interfering with interstate commerce by extortion. The indictment charged that the defendant used his influential union position to obstruct, delay and affect interstate commerce by extortion of money from the owner of a ready-mix concrete plant induced by fear and threats of labor disputes and of interference with the victim's contract to supply ready-mix concrete from his plant to be used for the erection of a steel-processing plant. In pleading the essential element of interstate commerce the Grand Jury not only alleged in general terms but also made the limited and specific finding that the steel plant contract caused sand to be moved in interstate commerce to the concrete plant. But the trial court charged the petit jury with two theories concerning the interstate commerce element, namely, that the defendant's guilt could be rested either on a finding (1) that sand used to make the concrete had been shipped into the concrete plant from out of state or (2) that the concrete was used for constructing a mill which would manufacture articles of steel to be shipped out of state. Thus the petit jury could return a verdict of guilty even though it believed no shipments of sand were proven, contrary to what the Grand Jury had in mind.

In other words, when the Grand Jury charges an element of the crime which cannot be treated as surplusage its description cannot be amended freehand. As stated by the Supreme Court in the Stirone case, 361 U.S. at 218-19:

> . . . when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, as in the Bain case, we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error. Cf. Cole v. Arkansas, 333 U.S. 196; De Jonge v. Oregon, 299 U.S. 353.

See also, United States v. Silverman, 430 F.2d 106, 109-112 (2d Cir. 1970).

The same error inheres in the instant prosecution. In pleading the essential element of concealed taxable income the Grand Jury not only alleged in general terms but also made the limited and specific finding that the defendant had received the income from the purchase and sale of heroin. But the trial court charged the petit jury with two distinct theories concerning the concealed taxable income one of which would permit a guilty verdict rested on a finding contrary to a belief that heroin transactions were proven as the Grand Jury specified.

Indeed, the trial j. y's note in the instant case suggests that it may have rejected out of hand Claude Pastou's testimony of trafficking in drugs with the defendant. For all we know, it may have had in mind entirely different sources of income, such as mortgage payments received in 1967 (Tr.129-130; 190-92; 196-197) or even such dark unproven sources improperly interjected by the prosecutor* as the numbers game run by Raymond Marquez (Tr.1832) or "organized crime" generally (Tr.1243-47). After all, the trial court did not require any "particular source" to be proved.

For purposes of logic, the danger of bypassing the Grand Jury's specification, see generally, Russell v. United States, 369 U.S. 749 (1962), may be viewed as follows: The heroin in the instant case is to the mortgage payments (and so forth) as the sand in Stirone was to the steel. In each case the indictment was effectively amended to permit a conviction to rest outside the Grand Jury's charge; accordingly, on the strength of Stirone defendant's conviction should be reversed. See also, United States v. Botticello, 422 F.2d 832 (2d Cir. 1970); United States v. Silverman, 430 F.2d 106, 109-12 (2d Cir. 1970). The preservation of defendant's Fifth Amendment safeguard of a Grand Jury indictment process requires no less.

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* The impropriety of these insinuations is discussed in a subsequent argument point.

II

THE PROSECUTION'S REFERENCE IN FINAL ARGUMENT TO DEFENDANT'S FAILURE TO CONTRADICT ITS DRUG TRANSACTION WITNESS AND HIS FAILURE TO PRESENT EVIDENCE OF WHERE HE HID HIS CASH HOARD WAS VIOLATIVE OF THE FIFTH AMENDMENT SINCE IT CAST A BURDEN ON THE DEFENDANT NOT IMPOSED BY THE LAW AND NATURALLY AND NECESSARILY HIGHLIGHTED IN A CRITICAL FASHION THE FACT THAT THE DEFENDANT EXERCISED HIS RIGHT NOT TO TESTIFY.

A: The Prosecutor's Commentary

It has long been the law in federal courts that remarks about the defendant's failure to take the stand constitute reversible error. 18 U.S.C.A. §3481; Wilson v. United States 149 U.S. 60 (1893). Such statements infringe upon the defendant's presumption of innocence and violate his Fifth Amendment right against self-incrimination by converting silence to evidence of guilt. Griffin v. California, 380 U.S. 609 (1965). The test for determining whether a statement before a jury by the judge or prosecutor was an improper comment upon a defendant's failure to testify has been defined as whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. United States v. Williams, 503 F.2d 480, 485 (2d Cir. 1974); Haberstroh v. Montanye, 493 F.2d 483 (2d Cir. 1974) (per curiam). Direct and indirect references by a prosecutor to an accused's decision not to testify and to rely on the presumption of innocence have on more than one occasion contributed to reversal of a conviction. See, e.g., Griffin v. California, supra; United States v. Alfonso-Perez, ___ F.2d ___, No. 75-1395, 2d Cir. May 17, 1976; United States v. Smith, 500 F.2d 293 (6th Cir. 1974);

United States v. Flannery, 451 F.2d 880 (1st Cir. 1971); Rodriguez-Sandoval v. United States, 409 F.2d 529 (1st Cir. 1969); United States v. Davis, 357 F.2d 438 (5th Cir. 1966); Carlin v. United States, 351 F.2d 618 (5th Cir. 1965); Desmond v. United States, 345 F.2d 225 (1st Cir. 1965); Barnes v. United States, 8 F.2d 832 (8th Cir. 1925).

In the case at bar, defendant finally chose not to testify; rather, he relied on his Fifth Amendment right to remain silent, on the prosecution's burden of proof imposed by our Constitution, and on the presumption that an accused is innocent until proven guilty beyond a reasonable doubt. Nonetheless, during his final argument, the prosecutor clearly implied that the jury should consider the defendant's failure to testify in determining defendant's guilt or innocence.

Early in his opening argument the prosecutor started to argue, "Moreover, no evidence was introduced to controvert Claude Pastou!" when defense counsel timely objected and moved for a mistrial (Tr. 2007). The Court overruled the objection and denied counsel's ensuing motion for an immediate instruction. The prosecutor then repeated the comment that Pastou's testimony "was not controverted in any significant fashion." (Tr.2008.)*

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* The complete episode appears in the transcript as follows:

"MR. BUSH: * * *

"Secondly, Mr. Pastou was subjected to a vigorous cross-examination, but the Government submits to you that his testimony was not shaken in any important regard.

(continued)

As a result of the foregoing, defense counsel was obliged, during his summation, to deal with the problem of contradicting Pastou and the difficulty of disproving such stale and unspecific accusations (Tr.2049-50).

Apparently not satisfied, the prosecutor used his closing argument to bring the comment closer to home. At the peroration -- in guise of pursuing a dispute he had started concerning the validity of the net worth starting point -- he urged the jurors, "What evidence was produced where this cash was? Was it hidden

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* (Footnote continued)

"Moreover, no evidence was introduced to controvert --

"MR. KRIEGER: Oh, I object to this and move for the withdrawal of a juror. He is shifting the burden, if the Court please. The defendant is not under any duty or imposed duty to introduce any evidence as to any matter concerned in this case.

"MR. BUSH: May I continue?

"THE COURT: You may continue, Mr. Bush.

MR. KRIEGER: I would respectfully ask the Court for an instruction in this area of the law.

"THE COURT: We are not involved in the area of the law, in the area you are talking about. He is talking about how they should accept the testimony of a witness.

"All right, proceed.

"MR. BUSH: His testimony, furthermore, was not controverted in any significant fashion. Indeed, in many important regards it was corroborated and substantiated."

(Tr.2007-08.)

under a rug? . . . Or a mattress?" (Tr.2079). Defense counsel again objected:

> "MR. KRIEGER: A burden is being imposed on the defendant. The defendant is under no obligation to produce evidence as to anything, and this is the second time the Government has made such an [a]llusion." (Tr. 2079.)

The Court overruled the objection, stating, twice, that "the Government has a right to comment" on the defense argument (Tr.2079); it then denied counsel's resulting motion for a mistrial (Tr.2080). At this point the prosecutor repeated and elaborated the injury:

> "MR. BUSH: Where was this money, hidden under a rug? A mattress? In a sock? Where were the rugs, the mattresses and the socks in this case?" (Tr.2080.)

Finally, lest the jurors miss the innuendo as to whose mouth the evidence should have been presented from, the prosecutor submits to them that the answers to his questions may be found in the defendant's "own words" as found in his own ancient extrajudicial statements (Tr.2080). Indeed, the phrase, the defendant's "own words" or "own hand" is repeated several times following the prosecutor's queries ensuring that the jury would naturally and necessarily take the prosecutor's argument as reflecting on the failure of the accused to testify at the trial (Tr.2080-81).

On these facts it would take a dull jury not to get the message. The comment that Pastou was not controverted suggests the defendant's burden either of testifying or presenting evidence to rebut him and further implies that because defendant chose not to testify and was unable to rebut Pastou's accusations, he must be

guilty. The assault here upon the presumption of innocence and the right to remain silent is, indeed, more complete. The only person who could controvert Pastou "in a significant fashion" (Tr.2008) was the accused. The drug transactions testified to by Pastou were necessarily secret. And no one would reasonably interpret the prosecutor's argument as a comment only upon the defendant's failure to produce the actual guilty party as a defense witness to exonerate the defendant and in the process inculpate himself. See Desmond v. United States, 345 F.2d 225 (1st Cir. 1965). The prosecutor could only have drawn critical attention to the fact that the defendant "had not taken the witness chair to deny or give his version of the affair" and "emphasized [the defendant's] testimonial silence." Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975) (per curiam).

The message becomes more specific in the prosecutor's closing argument. There the prosecution places an affirmative burden on the defendant to produce evidence. Moreover, the argument is that the evidence would have been secreted or hidden with the plain implication that defendant was claiming he had hidden a cash hoard in his home.* Since the evidence was secreted, evidently within the recesses of the defendant's home, the burden -- which the prosecution claims was not met -- falls squarely on the

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* The home as the suggested hiding place flows inevitably from the references to "rugs," "mattresses" and "socks." Further, previously defense counsel had said, "Don't go [bury] your dollars in the bricks of your house. Keep your dollars where you can use them" (Tr.2039) and, moreover, the prosecutor had reminded the jury of Mr. Adorno's testimony that he kept large sums of cash in his own apartment or house (Tr.2019).

defendant himself to testify proving the existence of the cash hoard. Furthermore, the prosecutor did not content himself just to comment on the failure to produce evidence. Instead, he asked a series of questions calling for explanations. Compare United States v. Smith, 500 F.2d 293 (6th Cir. 1974) (supervisory power reversal where the prosecutor in summation asked the jury to require the defendants, who chose not to take the witness stand in their own defense, to explain the meaning of their taped intercepted telephone conversations). Finally, he immediately followed these questions by directing the jury's attention to the accused and his "own words" given in the past (Tr.2080-81).

As in the recent decision of this Court in United States v. Alfonso-Perez, ___ F.2d ___, No. 75-1395, 2d Cir. May 17, 1976:

> This is more than merely stressing that the Government's evidence is uncontradicted; it specifically calls attention to the defendant's right to present evidence contradicting the Government's case, focusses that attention on the very person of the defendant, and implicitly calls for an inference from his failure to exercise that right. This is a far cry from the comments approved in [United States ex rel.] Leak [v. Follette, 418 F.2d 1266 (2d Cir. 1969), cert. denied, 397 U.S. 1050 (1970)], which went no further than the repeated assertion that the government witness' testimony was uncontradicted and not shaken on cross-examination. 418 F.2d at 1267 n.1.

The double impact of the prosecutor's drawing attention to the failure of the accused to take the witness stand and (1) controvert Claude Pastou and (2) prove a cash hoard violated defendant's

constitutional rights and denied him a fair trial.

The Court stated this was all fair comment on defense argument. But see, United States v. Alfonso-Perez, supra. Factually, the only argument we can identify to which the prosecutor's comment arguably even relates is the following:

> "According to Mr. Bush's theory of economics and finance, I think we have a reasonable explanation as to how come our country is in the financial trouble that it is. Basic rule of economics. Don't go [bury] your dollars in the bricks of your house. Keep your dollars where you can use them. That's why it is logical and usual for a [person] to seek maximum financing on his home and maximum financing if he is buying expensive automobiles." (Tr.2039.)

That defense argument was prompted by the prosecution, however, and obviously was intended to respond to the prosecutor's own argument that the net worth starting point chosen was valid since the defendant borrowed money to purchase his home and his automobile rather than paying cash (Tr.2012-13, 2024-27).* How this defense reply argument (that persons of means do not tie up their money in personal necessities but instead finance these in order to keep their capital available for more productive in-

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* The particular language to which defense counsel was responding is:

> "Ask yourself furthermore if a man of great wealth would in August of 1966, and September of that year, after he purportedly received almost all of the proceeds from these real estate transactions, go out and buy a house for a total purchase price of $37,500, and in buying that house assume a mortgage for $21,000 and take out a second mortgage for $11,000.
>
> "Ask yourself if a man of great wealth would buy a car in the middle of 1966 by taking out a heavy and substantial car loan."
>
> (Tr.2026-27.)

vestments) opens the door to a deserved prosecutorial comment that no evidence was produced as to where the cash was hidden is best left to the Brief for Appellee. But we ask how can it be fair to say that it was defense counsel who opened the door to the prosecutor's unconstitutional argument? And how can it be fair for the prosecutor to carry the argument as far as he did?

Courts considering cases involving improper comments by prosecutors regarding an accused's failure to testify often rely on the existence of an immediate and forceful curative instruction by the trial court in reaching the conclusion that the error was harmless:

> If the line between the permissible and the impermissible in this area is not always clear, nevertheless where the intent and the effect of the statement is ambiguous, limiting instructions may suffice to cure any harm. United States v. Nasta, 398 F.2d 283 (2d Cir. 1968).
>
> United States v. Gatto, 299 F.Supp. 697 (E.D.Pa. 1969).

Here, however, no immediate cautionary instruction was given in response to defense counsel's objections* In fact, the trial court's summary denials of each of the objections, and its assertions that "the Government had a right to comment" (Tr.2079), effectively gave the Court's own blessing to the improper suggestions implicit in the prosecutor's comments. Such prejudice could not easily be eradicated by the Court's instructions contained in the general charge.*

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* Buried in the Court's general charge to the jury, which was delivered the succeeding day, was a standard instruction concerning the defendant's right to remain silent (Tr.2132).

The Supreme Court has said: "The minds of the jurors can only remain unaffected by this circumstance [comment upon an accused's failure to testify] by excluding all reference to it." Wilson v. United States, 149 U.S. 60 (1893). Where there has been repeated prejudicial comment upon an accused's decision not to testify or offer an affirmative defense, "correction of error should be as prompt and timely as possible -- particularly where the error involves the infringement of a constitutional right." Desmond United States, 314 F.2d 242 (D.C. Cir. 1962); Smith v. United States, 268 F.2d 416 (9th Cir. 1959).

> It is true however, that ambiguous language, which indirectly invites the jury's attention to the accused's failure to take the stand, will, if not cured by prompt instructions, be grounds for setting aside a subsequent conviction.
>
> United States v. Fay, 349 F.2d 957 (2d Cir. 1965).

This case may have turned on the credibility of Claude Pastou or on the interpretation of the November 1965 financial transaction. The impact of a subtle allusion to the defendant's decision to remain silent could be very great where so much depended on the jury's evaluation of intangibles. Here the improper comments of the prosecutor were clear and repeated. No immediate cautionary instruction was given even though defense counsel raised his objection in a timely and vigorous fashion. These considerations indicate that the jury might naturally and necessarily have considered the defendant's exercise of his Fifth Amendment right to silence in reaching its verdict as a result of the prosecutor's

comments. Therefore, the failure to grant defendant's motion for a mistrial was error requiring reversal of the conviction and a new trial. E.g., United States v. Alfonso-Perez, ___ F.2d ___, 2d Cir., No. 75-1395, May 17, 1976; Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975) (per curiam); United States v. Smith, 500 F.2d 293 (6th Cir. 1974).

B: Other Assaults Upon the Presumption of Innocence

The prejudice accruing to Mr. Rodriguez from the prosecutor's improper commentary upon his testimonial silence, of course, infringes the presumption of innocence and tends to shift the burden of proof from the State to the accused. An array of other errors occurring at the trial had a similar thrust and, therefore, compounded the harm. Among the more serious are the following:

1. The prosecutor deliberately and unjustifiably drew attention, over objection, to the fact that Mr. Irwin Zemen, the attorney who had represented the defendant during the crucial property transactions of November 1965, invoked the defendant's attorney-client privilege when he appeared before a grand jury in Puerto Rico (Tr.1533-34; see also 1526). Defendant's motions for a mistrial were denied (Tr. 1534; 1643-45).

Specifically, in cross-examining Mr. Zemen the prosecutor confronted him with grand jury testimony in which he declined to disclose who any of the investors in the Madrid Hotel Corporation were (Tr.1533-34). The propriety of Mr. Zemen's invocation of the attorney-client privilege has never been challenged. Moreover, that assertion of privilege was not the least inconsistent, factually or legally, with anything Mr. Zemen had said at trial.

See United States v. Hale, 422 U.S. ____, 95 S.Ct. 2133 (1975); Grunewald v. United States, 353 U.S. 391 (1957). True, the preceding grand jury testimony read by the prosecutor was arguably proper impeachment. But the final question and answer read related to the defendant's privilege and only served the purpose of inviting the jury's attention to a circumstance which undoubtedly was viewed adversely by some of the jurors. And, again the defendant's silence was emphasized.

2. The prosecutor may also have planted a seed as to the explanation for the defendant's silence. A bad seed.

First, in his direct examination of Revenue Agent Davidson the prosecutor deliberately elicited that he was assigned to an "Organized Strike Force" (Tr.1243), that he had training in "Strike Force" fraud courses and that this meant investigation of tax returns of alleged members of organized crime. The Court failed to grant a mistrial or strike the testimony but it did tell the jurors that the testimony was not to influence the deliberations (Tr.1243-47).

Then, in cross-examining a Mr. Adorno the prosecutor asked about a man, Raymond Marquez, whom the prosecutor intended to argue was closely associated with the defendant: "Mr. Marquez is in the business of running the numbers game, is he not?" (Tr.1832). The defendant's motion for a mistrial was denied (Tr.1833). Similarly, the prosecutor again inserted the issue of guilt by association when during rebuttal he repeated the identification of Marquez as a "numbers operator." This occurred

in a context in which (a) no one had challenged who Marquez was, (b) his occupation was irrelevant, (c) the prosecutor had just assured the judge that the answer he wanted would be relevant to a proper inquiry, (d) defense counsel objected beforehand, (e) the witness was an FBI agent, and (f) the answer was an alleged admission of the defendant himself. Defendant's motions for a mistrial were denied (Tr.1907-7-8; 1994-95). And, thereafter the prosecution flaunted Raymond Marquez in argument to the jury (Tr.2013, 2018, 2020-21, 2022, 2024; see also 2072, 2073, 2076-77, 2080-81) thus forcing defense counsel also to struggle with this problem (Tr.2038, 2041).

Irrelevant and highly prejudicial testimony hinting the defendant's involvement in organized crime and numbers operation had no business in this case. Rules 401 and 403, Rules of Evidence for United States Courts and Magistrates. Casting Mr. Rodriguez as the real estate nominee of Marquez was perhaps permissible advocacy; casting Mr. Rodriguez as a partner in crime was not. E.g., United States v. De Cicco, 435 F.2d 478 (2d Cir. 1970); United States v. Tomaiolo, 249 F.2d 683, 687-690 (2d Cir. 1957). As this Court stated in De Cicco, 435 F.2d at 483:

> Little discussion is needed to demonstrate that prior similar acts of misconduct performed by one person cannot be used to infer guilty intent of another person who is not shown to be in any way involved in the prior misconduct, unless it be under a "birds of a feather" theory of justice. Guilt, however, cannot be inferred merely by association.

Here, the association with numbers operations not only impermissibly puts the defendant's character in issue before the jury but

also conjures poisonous speculation that he may have received unreported taxable income in 1967 from a gambling enterprise.

In short, the prosecution committed reversible error by its persistent efforts which deprived Mr. Rodriguez of his rightful cloak of innocence and instead tarred him in a presumption of criminality. Cf., Estelle v. Williams, 425 U.S. ____, 19 Cr.L. 3061, May 3, 1976.

3. Finally, having destroyed the presumption of innocence and shifted the burden of proof to the defendant, the prosecution obstructed his efforts to meet this burden Specifically, throughout the trial defense cross-examination was unduly limited. (E.g., Tr.602-607, 611-612, 632-34, 636-41, 647-50, 657, 679-80, 716-18, 744-46, 836-39, 840-41, 845-47, 848-51, 856-57, 869-70, 880, 882, 1008-24, 1028, 1100-1105, 1202-1203, 1209-10, 197-72; see also 1581-82). For that matter, despite the prosecutor's obvious vigor, the Court on its own interrupted or objected to defense counsel's examination frequently (Tr.636; 838-39; 869; 880; 882; 882; 885; 886; 1633; 1679-80; 1691-92; 1702; 1896; 1957; 1963; 1970-72; 1975). We don't recall the prosecutor receiving similar treatment. The net effect, without unduly prolonging this complaint, was to deny cross-examining defense counsel the benefit of "the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, Evidence §1367 at 29 (3d Ed. 1940).

In conclusion of this entire argument Point, defendant submits that the cumulative impact of the foregoing errors subjected him to a trial process forbidden by our accusatorial system of justice. His silence was converted into guilt.

III

THE TRIAL COURT'S SUPPLEMENTARY INSTRUCTION IMPROPERLY CURTAILED THE JURY'S LEGITIMATE FACTFINDING FUNCTION BY DIVORCING IT FROM ALL CONSIDERATION OF FAIRNESS, INVITED THE DERELICTION OF ITS FULL RESPONSIBILITIES BY POINTING TO APPELLATE REMEDIES, AND INEVITABLY PLACED INORDINATE PRESSURE ON THE LONE JUROR WHO PROMPTED IT BY DWELLING ON THE JUROR'S SUPPOSED CORRUPTION OF HER OATH BY SHOWING SENSITIVITY TO SUCH INTANGIBLES AS A FAIR TRIAL.

An extraordinary situation arose in this case which the trial judge interpreted as requiring a supplementary instruction packing even more "dynamite," and less balance, than the original Allen charge as passed on by the Supreme Court in 1896. A note from the jury advised the Court as follows:

> "One juror in our group feels that the courtroom atmosphere in the entire court was hostile at all times to the defendant's cause of action; therefore we cannot really ever come to a unanimous conclusion since that juror feels a fair trial has not taken place here. Doesn't this mean that we are impossibly locked and unable to give a verdict?"

(Tr.2164)

The Court sent the jurors home for the evening and heard defense counsel the following morning:

> "THE COURT: What do you suggest that the jury's note presents, Mr. Krieger?
>
> "MR. KRIEGER: Your Honor, I think what the Government has done here --
>
> "THE COURT: I didn't ask you that. I asked you what do you think the jury's note presents?
>
> "MR. KRIEGER: If the Court please, I read the jury's note as being a bit deeper than just it simply appears to state.
>
> "I don't think that this jury is saying, 'I am angry at the Judge' or 'I am angry at the prosecutor.'

I think that this juror may well have picked up, for instance, a portion of the Court's charge referring to the Government's responsibility to negate investigative leads as an example. The juror may have picked up, in the ambience of the courtroom, the fact that the Government's witnesses are biased and have been biased by activities of the Government.

"The juror may have picked up the feeling that the defense witnesses have been unfairly interrogated, approached or handled by the Government and therefore that juror feels that it cannot, he or she cannot come to a determination of guilt.

"I think that this juror is referring to the fact finding process, that the juror is not referring to just merely emotional responses.

"The juror -- and for all we know, there may be a reference contained herein to more than one juror -- the juror may be referring to the entire credibility test which the juror is to employ in assessing the evidence.

"This Court properly instructed the jury that 'You are to use your conscience in evaluating the credibility of the witnesses.'

"Now, we all know that a trial is not conducted in a vacuum and that the jury is to take into consideration all which it sees before it, and if the jury, because it has taken into consideration all of which it has seen before it and has weighed those factors in the evaluation of the entire testimony and has come to the conclusion that the Government's case is infected with a hostility against the defendant, and therefore has a reasonable doubt, that juror's opinion is to be respected, once again assuming that it is only one juror.

"I do not think, if the Court please, that what is contained in this note, I repeat, is a mere emotional reaction saying that the Judge was harsh. I don't think that is it at all, and that is basically the predicate for my objection to an Allen charge and the supplemental request.

"I further state to the Court I have submitted no request, your Honor, because I frankly can't see

a way out of this morass. I think it was created by the Government and the Government must bear the responsibility for it.

"THE COURT: All right, Mr. Krieger, thank you very much."

(Tr.2166-68)

The Court then immediately called for the jury and instructed it at great length (Tr.2169-78; reproduced in the Appendix at the same page designations).

In brief, the judge perceived the note as an attack on his own fairness, said, "the essence of the complaint is that a juror feels that the defendant, in the atmosphere in this courtroom, did not obtain a fair trial" (Tr.2169), and proceeded to charge the jury that fairness was none of their concern, that it was the function of the judge to attend to fairness, that the trial was fair, and that if it were not, the Court of Appeals sat to cure this error. Along this path the judge admonished repeatedly those jurors who would "invade" (Tr.2172) the province of fairness that such would "corrupt their oaths" (Tr.2169, 2172, 2172, 2173, 2173, 2178), indicated the desirability of reaching a verdict in this "important case" (Tr.2174), emphasized the expense of the trial (Tr.2175, 2176) and the necessity of a disposition at some time, announced the "very object and purpose of the jury system . . . to secure unanimity" (Tr.2176), suggested the need to change opinions (Tr.2176) and to "yield" judgments in further deliberations (Tr.2177), and misquoted the charge in Allen v. United States, 164 U.S. 492, 501 (1896). On the subject of Allen the judge also gave this jury language from

the Supreme Court's discussion -- as distinguished from the charge being reviewed -- belittling "blind" stubbornness:

> "Now, it cannot be that each juror should go into the jury room with a blind determination that the verdict shall represent his or her opinion of the case at the particular time or that he should close his ears to the argument of men and women who are equally honest and intelligent as himself or herself and who bear the same responsibility, serve under the same sanction of the same oath and heard the same evidence with, we may assume, the same attention and with an equal desire to arrive at a fair and honest determination."
>
> (Tr.2177-78)

See generally, Note, The Allen Charge Dilemma, 10 Amer.Crim.L. Rev. 637, 667 & n.113 (1972).

Defense counsel excepted to this charge.*

The grounds stated for exception were several and are set out below:

> "MR. KRIEGER: Your Honor, I believe that I have a few things which I would like to spread on the record at this point.
>
> "THE COURT: Sure.
>
> "MR. KRIEGER: Thank you.
>
> "If your Honor please, number one, I take respectful exception to the entire supplemental instruction as not being responsive, number one, to the note sent by the jury, Court's Exhibit No. 7, and number two, has introduced into this case matters that should not be presented to the jury as, for instance, the explanation of the Court for its decisions on motions for mistrial, as an example;

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* For a complete review of the deadlocked jury problems herein the Court should be aware that such were briefly communicated in an earlier note (Tr.2162-63) and again, in a varied fashion, in a subsequent note (Tr.2192-93).

the description to the jury of the functions of the various parties; the fact that the adversary system is merely a contest of skills and that the responsibility for a fair trial rests solely with the Court.

"I further take exception to the introduction before this jury of a contention that there are hidden personal views when there is no basis therefor, and the use of the term that a juror would be corrupting his or her oath in adhering to the position as exemplified in Court's Exhibit No. 7.

"I would further take respectful exception to the portion of the Court's supplemental instruction referring to the existence of the Court of Appeals and the function of the Court of Appeals --

"THE COURT: Well, Mr. Krieger, I think you have said enough to protect yourself on the record.

"MR. KRIEGER: I am fearful, your Honor -- I am very candid to state, your Honor, that --

"THE COURT: As a matter of fact, you except to the whole supplementary charge and I think you are protected on the record.

"MR. KRIEGER: May I add one other thing with the Court's permission?

"I would respectfully ask the Court for a hearing . . . ."

There are problems -- unwieldy ones -- in the trial court's reaction to the "atmospheric unfairness" note. Defense counsel attempted to communicate these both before and after the supplementary charge and that attempt has been quoted in full herein. We presume the great coercive pressure placed upon the lone juror who had prompted the charge is manifest. Without undue repetition, the following points are added:

1. The judge may well have misconceived what was troubling the juror. By taking a lawyer's view of what a "hostile"

courtroom and a "fair trial" portend, he may have overlooked the lay understanding of these terms. In any event, the jury's proper function in factfinding cannot be pried apart in mechanical fashion from the judge's function in ruling on law. Notions of fairness permeate both roles. And trial facts are perceived as a "gestalt." See Skidmore v. Baltimore & O.R.Co., 167 F.2d 54, 68 (2d Cir. 1948) (Frank, J.).

Factfinders in an adversary hearing judge witnesses (and their demeanor, bias, prejudice, interest and ultimate credibility) by countless intangibles -- including the "atmosphere" in the courtroom. Moreover, they are entitled to judge the parties and their courtroom behavior. For example, the prosecutor's improper attempt to suppress information may be taken as an affirmative evidence of the weakness of the entire prosecution case. United States v. Remington, 191 F.2d 246, 251 (2d Cir. 1951). See generally, 2 Wigmore, Evidence §278 (3d Ed. 1940). The instant case prickles with such fairness considerations (see Tr. 2166-68) and it was error for the trial court to blind the jurors to them.

Finally, to the extent that the note brought the judge's conduct of the trial into scrutiny, as well as the prosecutor's (and of course, the witnesses themselves), we should not lose sight of the fact that the "deep commitment of the Nation to the right of jury trial in serious criminal cases" has a history and purpose to check the potential of oppression by judges. Duncan v.

Louisiana, 391 U.S. 145, 156 (1968). Jurors are not automatons.*

2. The judge further undermined the jury by directing its attention to the existence of an appeals court and its remedial function. Such reference could only invite the jury to take its responsibilities less seriously and constitutes grounds for reversal. United States v. Fiorito, 300 F.2d 424, 427 (7th Cir. 1962); see United States v. Greenberg, 445 F.2d 1158, 11962 (2d Cir. 1971) (unobjected to reference to appeals court not reversible error but "better procedure" to avoid such hazards).

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* The Supreme Court reminded us in Duncan v. Louisiana, 391 U.S. at 156:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

3. Further, we assume this Court of Appeals would generally prefer trial judges in the Second Circuit not to invent such problems as arose herein from the Court's warning that the jurors would be "corrupting their oaths" by considering aspects of fairness. Perhaps with overdue optimism, we suggest that the Court may not only wish to reverse defendant's conviction but also to consider prescribing the A.B.A. Jury Trial Standards as a substitute for future Allen-type adventures. Cf. United States v. Domenech, 476 F.2d 1229, 1231-32 (2d Cir.), cert. denied, 414 U.S. 840 (1973); United States v. Beckerman, 516 F.2d 905, 909-10 (2d Cir. 1975). Respectfully, we invite this Court's attention to the cases in other Circuits which have banned Allen and approved the A.B.A. recommendations. United States v. Thomas, 449 F.2d 1177 (D.C.Cir. 1971) (en banc); United States v. Fiorenti, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969); United States v. Brown, 411 F.2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970); United States v. Silvern, 484 F.2d 8[illegible] (7th Circ. 1973) (en banc); contra, United States v. Bailey, 480 F.2d 518 (5th Cir. 1973) (en banc). See generally, Note, The Allen Charge Dilemma, 10 Amer.Crim.L.Rev. 637 (1972). See also, Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge, 53 Va.L.Rev. 123 (1967).

4 In any event, because in the instant case the supplementary instruction infringed upon the defendant's Sixth Amendment jury trial right, his conviction should be reversed.

IV

WHEN THE COURT RULED ON THE JURY'S LAST DEADLOCK NOTE WITHOUT NOTIFYING THE PARTIES AND WITHOUT COUNSEL OR THE DEFENDANT PRESENT IT VIOLATED RULE 43 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHTS TO OPEN COURT PROCEEDINGS, TO BE PRESENT AT EVERY STAGE OF THOSE PROCEEDINGS AND TO BE HEARD BY COUNSEL THEREAT.

Following the Allen episode of the previous argument point, the trial judge received another note from the jury describing the circumstances of its continued disagreement. Instead of (1) notifying the defendant and (2) his counsel and (3) giving them the opportunity (4) to appe r and (5) to respond, and then instead of (6) having the jury brought to the open courtroom (7) for whatever instructions it deemed appropriate in its informed discretion after hearing from the parties, and (8) after hearing timely exceptions, the Court simply sent in word to them that "I wanted them to continue in their deliberations" (Tr.2193) and advised counsel of this several hours after the fact. This entire episode which violates a panoply of established rights and controvenes all orderly trial procedure, appears succinctly in the transcript:

> "THE COURT: I have a note which I received from the jury while I was in the other case and the answer to which I indicated that I wanted them to continue to deliberate, but I will read the document.
>
> 'Your Honor, we, the members of the jury, were voting on the verdict since 2.30 yesterday when we had ten guilty, one undecided and one not guilty.'
>
> "I can't read that. There is one phrase I can't read, but something on something.

"Maybe it means 'Or . further ballot the undecided shifted to guilty and the same juror still votes not guilty. Apart from one juror feeling, first the evidence is insufficient for a verdict of guilty, this juror continues to feel that the trial was conducted in an atmosphere detrimental to the defendant's cause of action. Accordingly we feel no further deliberations would be fruitful.'

"I sent in word to them that I wanted them to continue their deliberations after I received that note, and I am going to persist in that.

"MR. KRIEGER: Would your Honor indicate at about what time that note was sent in, please?

"THE COURT: I thought I had indicated that. 3.45."

(Tr.2192-93)

This, we submit, is the antithesis of due process.

In Shields v. United States, 273 U.S. 583 (1927) a unanimous Supreme Court reversed the petitioner's conviction in a case where the jury sent a note communicating inability to agree as to some defendants and the judge on his own sent back a written reply telling the jury they would have to decide as to all defendants. Shields appears to be remarkably indistinguishable from the case at hand. And Shields is still good law.*

In Rogers v. United States, ___ U.S. ___, 95 S.Ct. 2091 (1975) a unanimous Supreme Court, speaking through the Chief Justice, reversed the petitioner's conviction as plain error in a case where the jury sent a note inquiring whether the Court would accept a verdict of "Guilty as charged with extreme mercy of the court" and the judge on his own sent back instructions

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* Indeed, it is now buttressed by Rule 43 of the Federal Rules of Criminal Procedure.

through the marshal that his answer was affirmative. Shields is prominently cited, quoted, and relied on in Rogers.

Herein the defendant and his counsel were, among other things, deprived of the substantial right to address advocacy to the trial court's discretion before it acted on the problematical note. See Fillippon v. Albion Vein Slate Co., 250 U.S. 76 (1919). On the direct authority of Shields and Rogers, his conviction should be reversed.

CONCLUSION

For each of the foregoing reasons, and by virtue of their cumulative impact on the defendant's fair trial rights, the conviction below should be reversed and the case remanded for a new trial.

Respectfully submitted,

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June 11, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1188

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN RODRIGUEZ,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I, JOSEPH BEELER, hereby certify that I have served each party required to be served by placing two copies each of the Brief for Appellant and the Appendix for Appellant in a postage prepaid container and placing said container in a United States Mail receptacle in the United States Post Office, Los Gatos, California, addressed as follows:

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DATED: June 11, 1976

Joseph Beeler